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IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 114

STEWART B. HOPPS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STEWART B. HOPPS, *Petitioner*

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on April 2, 1964, and the order of that Court denying the Appellant's Petition for Rehearing En Banc, entered on April 23, 1964.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, denying in substance the defendant's pretrial motion to suppress, is reported

at 215 F. Supp. 734, and appears at page 144 of the "Appendix For Appellant" which was prepared for the use of the Court below and which has been submitted with this petition. The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the trial court, is not yet reported and appears at p. 1a of the Appendix hereto. The order of the Court of Appeals denying the Appellant's Petition for Rehearing En Banc appears at page 19a of the Appendix hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals sought to be reviewed was dated and entered on April 2, 1964, and the order of the Court denying Appellant's Petition for Rehearing En Banc was dated and entered on April 23, 1964.

The jurisdiction of this Court is invoked pursuant to Section 1254, Title 28, of the United States Code.

QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires that documentary matter, essentially correspondence, seized by officers of the State of California in a search of Stewart B. Hopps' private office in San Francisco, without his consent and without a search warrant or the existence of probable cause for the issuance thereof, should be suppressed in a Federal criminal prosecution of Hopps where the asserted justification for the search and seizure was (1) a state civil order, applied for exclusively on the basis of information and belief and issued in an *ex parte* proceeding, authorizing state officers to take possession of a named corporation's property wheresoever situated,

and (2) the alleged consent to the search of Hopps' office by the corporation's attorney.

2. Whether the decision of the Court below (based on decisions of the Court of Appeals for the Second Circuit), that illegally seized corporate papers need not be suppressed for the purposes of a Federal criminal prosecution of Hopps, who had standing to attack such seizure, constitutes a violation of his Fourth Amendment rights, and whether it is in conflict with the decision of the Court of Appeals for the Fifth Circuit on the same matter.

3. Whether the actions of the California Insurance Commissioner, who was in possession of Hopps' papers by reason of a state civil proceeding, in (1) allowing Federal investigators to copy and examine the papers and (2) in surrendering them to Federal prosecutors in response to a subpoena, all without the prior authority or consent of the court having jurisdiction over the state conservatorship proceedings, constitute a violation of Hopps' rights under the Fourth and Fifth Amendments to have a judicial determination made before such rights in and to his papers and effects are extinguished.

4. Whether the Fourth and Fifth Amendments require that documentary matter, exclusively correspondence, acquired by means of a New York State investigative subpoena *duces tecum* from Hopps' New York office—in his absence and without his consent —should be suppressed in a Federal criminal prosecution of Hopps where (1) the subpoena called for the production of "your correspondence files" and was served on and complied with by a secretary in the office who neither possessed such files in her own

right nor was authorized to produce any of the files in Hopps' New York office, and where (2) the constitutionality of the state statute authorizing the use of the investigative subpoena rested upon a concomitant grant of immunity incident to compliance therewith.

5. Whether the Fourth and Fifth Amendments require that documentary matter acquired by means of a Federal subpoena *duces tecum* from the Maryland offices of International Guaranty and Insurance Company, should be suppressed in a Federal criminal prosecution of Hopps where (1) the trial court found that Hopps supervised and directed the business of the corporation, where (2) the subpoena called for the production of *"all"* documents in possession of the corporation at the time of service of the subpoena and where (3) the subpoena was served and complied with without the knowledge or consent of Hopps.

6. Whether Hopps was effectively denied his Fourth Amendment rights by reason of the court's failure to identify and segregate those "personal papers" found to be suppressed from those not suppressed.

7. Whether the trial court's instruction, whereby the jury was allowed to find specific knowledge in Hopps as to the worthlessness of certain securities, a finding necessary to conviction, from evidence adduced by the Government on an entirely unrelated matter which had itself been withdrawn from the jury as a basis for conviction, constituted substantial and plain error which effectively denied to Hopps his right to a fair trial under the Fifth and Sixth Amendments.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

California Code (Insurance Code Annotated):

> "Section 1011. Order of Court: Conditions and grounds for issuance.
>
> "The superior court of the county in which is located the principal office of such person in this state shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order vesting title to all of the assets of such person, wheresoever situated, in the commissioner or his successor in office, in his official capacity as such, and direct the commissioner forthwith to take possession of all of its *books, records, property, real and personal,* and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants, and employees from the transaction of its business or disposition of its property until the further order of said court. * * *"

General Business Law of New York, Sections 352, 354 and 359 (text printed at pp. 22a-24a, Appendix hereto)

STATEMENT OF THE CASE

Stewart B. Hopps was tried and convicted on two counts of using the mails in connection with an alleged scheme to defraud. The thrust of the indictment and the ensuing prosecution was to the effect that acts committed in the name of International Guaranty and Insurance Company of Tangier, Morocco, (hereinafter International) were in fact the acts of Hopps himself. This prosecutive theory is

evidenced by the opening paragraph of the indictment which reads, in pertinent part:

> "The Grand Jury for the District of Maryland charges: 1. At all times hereinafter mentioned, the defendant, Stewart B. Hopps, dominated, supervised, managed, and controlled the business and affairs, in the United States of America, of a corporation of Tangier, Morocco, now known as International Guaranty and Insurance Company, . . ."

In the course of its investigation and prosecution of Hopps, the United States amassed literally thousands of papers and documents. The great bulk of these documents, and of those actually admitted into evidence at trial, were acquired by the United States or state authorities from three locations: (1) Hopps' office at 417 Montgomery Street, San Francisco, California; (2) Hopps' office at 44 Wall Street, New York City, and (3) the Silver Spring, Maryland, office of International Guaranty and Insurance Underwriters, Inc.

The "California" and "New York" papers were initially secured by officials of those states and subsequently delivered to Federal prosecutors in response to Federal subpoenas *duces tecum*. The "Maryland" papers were acquired directly by Federal prosecutors by means of a subpoena *duces tecum*.

Throughout the proceedings below, Hopps contended that the papers were secured in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States and should, therefore, have been suppressed for the purpose of a Federal criminal prosecution of him personally.

California Papers

For the better part of his life, Stewart B. Hopps had been engaged in various aspects of the insurance business. In late 1957 and early 1958, one of his interests was as adviser and consultant to International, principally in connection with the institution of its operations in the United States. As of April, 1958, Hopps had, for a number of years, maintained an office at Suite 1001, 417 Montgomery Street, San Francisco, California, in conjunction with a corporation which he owned and controlled, U. S. Marine and Foreign Securities (hereinafter U.S. Marine), and from which he conducted a number of his varied insurance enterprises, involving other corporations such as Anglo-Canadian Underwriters (Anglo-can), Mortgage Corporation of America (MCA) and American Armed Services Underwriters (AASU).

Hopps' correspondence and related papers in connection with his own and other corporations as well as his dealings with and in behalf of International were maintained in his office at Suite 1001. One file drawer bore a card marked "International" wherein Hopps maintained the bulk of his correspondence relating to International, as well as some of his correspondence relating to such corporations as U.S. Marine, Anglo-can, etc. Hopps maintained throughout the proceedings below that all the papers in Suite 1001 were his personal papers, maintained in relation to his owned and controlled corporations and corporations with and for which he did business.

In early February, 1958, the California Insurance Department initiated an investigation to determine if International was operating as an unlicensed in-

surance carrier in the State of California. On April 3, 1958, the California Insurance Commissioner filed an application, based exclusively on "information and belief", in the Superior Court of the County of San Francisco to place International into conservatorship. That same day an *ex parte* order was issued designating the Commissioner as conservator of International, giving him title to the assets of the corporation but only the right of possession as to its books, records, and property. Hopps was not served with a copy of the Order. No search warrant was ever issued or sought.

Prior to the issuance of the conservatorship order, no investigation was made to determine what business was in fact being conducted at Suite 1001, nor was an attempt made to determine the tenant of record or who paid the rent, utilities or salaries of employees there. International hired a San Francisco law firm to represent it incident to the conservatorship and one Eugene Clifford, of the firm, handled the matter. The firm did not represent Hopps personally.

On April 14 and 15, 1958, representatives of the California Insurance Department, under color of the order, removed from Suite 1001 hundreds of papers approximating in volume two file drawers. These papers were taken from file drawers and from the tops of file cabinets and desks in the office. They comprised chiefly copies of Hopps' correspondence relating to International, U.S. Marine and Hopps' other corporations. Also taken were mailing stamps and a stenographic notebook removed from the stenographer's desk, which was admittedly unintelligible to the officers conducting the search. The investigators purpose in going to Suite 1001 was to secure records,

not to operate International. It was admitted, however, that no basic corporate records were found in Hopps' office.

Hopps was not present at and had no knowledge of the search and seizure on April 14 and 15. Eugene Clifford was present during most of the search. The United States contended that he had authorized the search of Hopps' office for records of International. Clifford denied this.

Within thirty days after their seizure, the papers taken from Suite 1001 were examined by Federal Postal Inspectors from Baltimore while they were in the custody of the California Insurance Commissioner. One of these same inspectors, who was then principally in charge of the investigation of Hopps, had also conferred with the California insurance officials *before* the seizure (on or about March 8, 1958). The Insurance Commissioner also allowed Internal Revenue agents and representatives of the New York Attorney General to examine the papers. In March, 1960, the conservatorship court ordered the seized papers to be returned. They were not returned however, and in April, 1960, the Insurance Commissioner sent all of the papers seized from Suite 1001 to the United States Attorney in Baltimore, Maryland, in response to a Federal subpoena *duces tecum* calling for the production of "all files, books, records and papers" of International then in the possession of the Commissioner. This was done without prior application to or authority of the conservatorship court which at that time still retained jurisdiction over the operation of the conservatorship and had outstanding an order for the return of the papers.

The trial court refused to grant Hopps' motion to suppress the papers so taken from his San Francisco office with the exception of unspecified "purely personal papers of Hopps not related to International's business." The court also refused Hopps' request that it specify which papers were considered personal, and therefore suppressed, under its ruling on the motion.

New York Papers

For many years, Hopps had also maintained an office at 44 Wall Street, New York City, in connection with his corporation, U. S. Marine. In early 1959, Hopps, as a matter of accommodation, was allowing another corporation to use space in that office. One Loretto Lindhauer, Hopps' former secretary, was employed by that corporation and maintained a desk in the Wall Street office.

In September, 1959, representatives of the New York State Attorney General examined and obtained copies of the papers which had been seized from Hopps' San Francisco office in April, 1958. Thereafter, in November, 1959, the State of New York initiated an inquiry into the practices of named savings and loan associations in connection with their dealings in securities within and from the State of New York. On January 27, 1960, Loretto Lindhauer testified in this inquiry for the second time and was then served with a subpoena *duces tecum* commanding her to appear and testify on February 8, 1960, and to bring with her, *inter alia*, ". . . your correspondence files pertaining to International Guaranty and Insurance Co.". On February 8, Miss Lindhauer delivered a box full of Hopps' correspondence files in response to the subpoena. Hopps was not in New

York on February 8, and neither knew of nor authorized the delivery of his correspondence files by Lindhauer. Federal prosecutors subsequently obtained these same papers by means of a subpoena served on the New York authorities.

The trial court refused to suppress any of the papers so taken from Hopps' New York office other than unspecified "personal papers of Hopps, not 'pertaining to International Guaranty and Insurance Co.'" and, as in the case of the California papers, did not specify which papers came within its description of "personal papers".

Maryland Papers

The trial court found that Hopps supervised and directed, from his San Francisco office, the business of International Guaranty and Insurance Underwriters, Inc., of Silver Spring, Md. (hereinafter International, Maryland, and to be distinguished from the "International" referred to above). On April 18, 1958, the United States Attorney, Baltimore, caused to be served on International, Maryland, a subpoena *duces tecum* calling, in pertinent part, for the production of ". . . all documents, records, papers and correspondence in the possession of said Corporation at the time of the service of this subpoena.". By means of this subpoena, the U.S. Attorney secured numerous documents which were used in the further investigation and prosecution of Hopps, many of which were letters and memoranda prepared by him. Hopps had no knowledge of the service of the subpoena and took no part in nor authorized the surrender of the documents.

The trial court refused to suppress any of the papers so secured from International, Maryland.

Trial Proceedings

The trial court charged the jury that it could convict Hopps only if it found that certain securities of named corporations were absolutely valueless at the time of the mailings, and that Hopps *knew* of such valuelessness. In a prior instruction, the court had taken from the jury, as a basis for conviction, a count of the indictment alleging falsity as to certain representations regarding reinsurance facilities available to International. The court withdrew the reinsurance count after holding that it was essentially unrelated to the scheme alleged in the indictment (misrepresentation of assets).

In a further instruction, however, the court allowed the jury to consider the evidence adduced upon the reinsurance charge as going to the willfulness of Hopps in the mailings and as to his *knowledge* of the valuelessness of the concerned securities.

On appeal, Hopps assigned as error that portion of the instruction whereby the jury was allowed to find his specific knowledge of the valuelessness of the securities, an element necessary to conviction, from evidence adduced on an unrelated matter. In its opinion affirming the trial court, the Court of Appeals treated only the subject instruction as it went to the willfulness of Hopps in relation to the mailings (an element of the instruction which was not assigned as error), but failed to pass on the error urged.

FEDERAL JURISDICTION

Federal jurisdiction is based on the fact that this is a criminal action instituted by the United States upon an Indictment charging the petitioner with use of the mails in a scheme to defraud, in violation of Section 1341, Title 18, of the United States Code.

REASONS FOR ALLOWANCE OF THE WRIT

Despite the fact that Hopps was ultimately to be convicted upon the theory that International's acts were his acts, he was consistently denied his individual rights by virtue of holdings in the courts below that the matters of which Hopps complained in regard to the acquisition of evidence used against him were in fact directed against or had only to do with International or other corporate entities. Thus, for the purpose of determining the constitutionality of the means by which virtually the entire case against Hopps was made, Hopps himself was held by the courts below to be only incidentally involved. Yet, for the purpose of conviction, the entire weight of some five years of state and federal investigation was brought to bear against Hopps personally. It is submitted as fundamental that the Government is not to be allowed such a contradictory prosecutive theory and that this Court's holding in *Jones* v. *United States*, 362 U.S. 257 (1960) clearly enunciates this principle.

1. The warrantless search and seizure of Hopps' San Francisco office was unauthorized, unreasonable and unquestionably directed against him as well as International and, as such, constituted a prohibited violation of his privacy, papers and effects which clearly renders the evidence so secured inadmissible in a Federal criminal prosecution of him personally.

The Court of Appeals correctly held that, in determining whether the papers seized by state officers from Hopps' San Francisco office should be suppressed, Federal standards must be applied, citing *Elkins* v. *United States*, 364 U.S. 206 (1960). The question thus presented is whether the proceedings and manner in which the papers were seized by state officers from Hopps' office are to be equated with the relevant Federal safeguards attending searches and seizures.

The relevant standard is nowhere better stated than in the language of the Fourth Amendment itself. Simply stated, the amendment prohibits unreasonable searches and seizures and requires *probable cause* for the issuance of a search warrant as well as a warrant particularly describing both the place to be searched and the things to be seized. Here, the "information and belief" upon which the conservatorship order was based was clearly insufficient to establish the requisite probable cause. *Nathanson* v. *United States*, 290 U.S. 41 (1933). Further, the order utterly failed to describe any particular place to be searched or things to be seized.[1] Moreover the matter seized —correspondence per se—is not a legitimative object for search and seizure under Federal standards.

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[1] The California conservatorship order and the application therefor appear at p. 399 of "Appendix for Appellant" printed for the use of the court below and submitted with this petition.

For the purposes of a Federal criminal prosecution, therefore, the acquisition of the California papers does not meet the test of Federal law. And it is of no avail that the California proceedings were civil in nature and that their constitutionality has been sustained. The constitutionality of such proceedings, as provided by the California Insurance Code, has never been at issue. However, the means employed in this case in acquiring purely evidentiary material later used in a Federal criminal prosecution *is* at issue. The real and controlling principle here was well-expressed by Justice Brennan in *Abel* v. *United States,* 362 U.S. 217 (1960) where he suggested that an attempt to differentiate between criminal and civil proceedings, in measuring the power of the Government to make a warrantless search, "perverts the Fourth Amendment". In the same case, Justice Frankfurter cautioned that, "the preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and the laws of the United States."

That the California conservatorship proceedings in fact constituted a preliminary stage and most vital part of the Federal criminal prosecution of Hopps is manifest. This would be so even had the formal Federal investigation been initiated *after* the search and seizure at Suite 1001. Here, however, it is beyond question that Federal postal authorities had begun their investigation of Hopps and had in fact conferred with California officials *prior* to the search and seizure and, of course, had examined and copied the documents within thirty days thereafter.

In connection with its ruling on the motion to suppress, the trial court separated the papers seized from

Suite 1001 into three categories, i.e., (1) papers of International; (2) the papers of "other corporations", and (3) "the papers of Hopps himself". The court found, as asserted justification for the seizure of International's papers, that the conservatorship order, coupled with the alleged consent of International's attorney (Clifford), authorized the entry into and taking from Hopps' private office of International's papers. Clifford denied that he had consented to the search in behalf of International and testified that he felt powerless to take a position one way or another in the face of the order. The trial court recognized this situation by noting that, "In view of the fact that Clifford was faced with the court order, his failure to object to [the taking of] the papers did not amount to a completely voluntary consent to the taking". Not only was such "consent" qualified, it was no consent at all. *Amos* v. *United States,* 225 U.S. 313 (1921). This is so as to the right of International as such and beyond question is absolutely controlling as to the individual rights of Hopps. Thus, there was no authority, under Federal standards, for the search and seizure even as to the alleged papers of International, the order itself being insufficient for this purpose and there being no meaningful consent.

The trial court held that the conservatorship order did not authorize a search of Hopps' office ". . . for papers belonging to any individual or other corporation . . ." and that Clifford had no authority to consent to such a search. Yet, the court refused to suppress the papers of "other corporations" (such as U.S. Marine, Anglo-can, etc.) which were in fact seized from Hopps' private office admittedly without any semblance of authority, either under color of the

order or an alleged consent—this despite the fact that Hopps was accorded standing to attack the assertedly unlawful seizure of the papers of those corporations on the basis of his ownership, control, and/or possession thereof.

In sum, the papers seized from Hopps' San Francisco office were obtained by means of a search and seizure fully subject to Federal standards and the "evidence" so seized is inadmissible in a Federal criminal prosecution of Hopps as the fruits of a warrantless and unreasonable search and seizure prohibited by the Fourth Amendment. *Elkins*, supra; *Gouled* v. *United States*, 255 U.S. 298 (1921); *Harris* v. *United States*, 331 U.S. 145 (1947); *United States* v. *Leftkowitz*, 285 U.S. 452 (1932). The judgment of the Court of Appeals affirming the trial court's refusal to suppress the papers seized from Hopps' San Francisco office is not in accordance with the relevant Federal standards and is in direct conflict with applicable decisions of this Court.

2. As it affirms the trial court's refusal to suppress papers of corporations other than International illegally seized from Hopps' San Francisco office, the judgment of the Court of Appeals is in error and in conflict with the decision of the Court of Appeals for the Fifth Circuit on the same matter.

Implicit in a meaningful grant of standing to an individual to attack an illegal search and seizure of assertedly "corporate" papers is the ultimate suppression of such papers in a criminal prosecution of the individual. In the case at bar, however, the trial court refused to suppress illegally seized "corporate" papers as to which it had previously accorded Hopps standing, such refusal being based on the sole ground

that, as to the papers in question, Hopps had been doing business as a corporation and was therefore not entitled to secure his *own* rights in the papers. As will be demonstrated below, such a holding is clearly erroneous and is in fact in direct conflict with the decision of another court of appeals on the same matter.

The trial court held that the only authority for the search of Hopps' San Francisco office related to property of International. As to the papers of corporations other than International, the court held that there had in fact been a search and seizure; that it was not authorized by the order; that Clifford had no power to consent to such a search and seizure; that Hopps had not consented to it; and that Hopps had standing to attack the seizure of such papers based upon his ownership and control of the corporations. Further, the trial court found that the search "was directed at Hopps as well as International." Having so concluded, however, the trial court then effectively denied Hopps any *meaningful* standing and, consequently, the power to secure his individual rights, by holding:

> "(3) With respect to any papers which may have belonged to corporations other than International, there was also a seizure as well as a search. But although Hopps has standing to raise any rights which he himself may have with respect to such papers, he may not rely on the possible rights of the respective corporations. 'When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment * * *.' Lagow v.

United States, 2 Cir., 159 F.2d 245, 246, quoted with approval in United States v. Guterma, 2 Cir., 272 F.2d 344, 346."[2]

The Court of Appeals affirmed the holding of the trial court in this regard. Such a holding is submitted as being in direct conflict with the Fifth Circuit case of *Henzel* v. *United States,* 296 F.2d 650 (1961), wherein the court reversed the trial court's refusal to suppress certain documents in a factual situation identical to the case at bar in all material respects. In *Henzel,* as in the instant case, there was no authority for the search for and seizure of the corporate documents (apart from the concurrence of state authorities holding the property under order of court); the defendant was the organizer and sole stockholder of the concerned corporation; he had prepared much of the material seized (which was kept in his office along with some of his personal belongings), and the search, by a Postal Inspector, was directed at the defendant personally during the latter's absence from the premises while he was out of possession of the property involved.

A reading of *Henzel* leaves no doubt that it was decided by reference to the pronouncements of this Court in *Jones* v. *United States,* 362 U.S. 257 (1960) which, of course, was decided after *Lagow* (1946), the Second Circuit case upon which the trial court here relied and upon which similar Second Circuit cases have been premised.

In light of the findings of the trial court as to the total lack of justification for the seizure of papers

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[2] P. 170, "Appendix For Appellant" submitted herewith.

of corporations other than International—findings which were not upset by the Court of Appeals—it is clear that Hopps was denied suppression of the concerned papers on the exclusive basis that, ". . . he may not vicariously take on the privilege of the corporation under the Fourth Amendment . . ." *Lagow*, supra. *Henzel*, on the other hand, clearly and correctly requires that the fact of corporate operation be ignored for the purposes of affording the individual a meaningful remedy where he has an interest in the property seized and the premises searched to the extent that Hopps clearly had in this case.

The clear conflict between circuits is dramatized by the following quotations:

FIFTH CIRCUIT

Henzel v. *United States*, 296 F.2d 650, 652:

> "*Nor does it make any difference that the property seized and the premises searched in this case were owned by a corporation rather than by an individual.* Since a corporation has the same rights as a natural person to be free from illegal searches and seizures, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, there is nothing in the corporate status of Chemoil which would prevent appellant [an individual] from attacking the unlawful search and seizure of the corporation's property." (Emphasis and brackets added).

SECOND CIRCUIT

Lagow v. *United States*, 159 F.2d 245, 246:

> ". . . When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; *documents*

> *which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation.* Its wrongs are not his wrongs; its immunity is not his immunity. This we have four times decided. In re Dooley, 2 Cir., 48 F.2d 121; United States v. De Vasto, 2 Cir., 52 F.2d 26, 78 A.L.R. 336; Connolly v. Medalie, 2 Cir., 58 F.2d 629; United States v. Antonelli Fireworks Co., 2 Cir., 155 F.2d 631, 636." (Emphasis added).

Critically at issue in the face of diametrically contrary holdings by different Circuits (Second, Fourth and Fifth) is the question of whether corporate records, under any circumstances, may be suppressed by an individual defendant where such records concededly were obtained by an unlawful search and seizure and where the particular defendant admittedly had standing to challenge the same. Bearing in mind that the overwhelming volume of American business is conducted through corporations, it is essential that the Supreme Court resolve this question once and for all. Wholly apart from the overriding need for such resolution and a clear conflict among Circuits rests the fact that, if corporate records per se are to be beyond the scope of a motion to suppress filed on behalf of an individual defendant having standing to challenge an unlawful search and seizure, the entire *deterrent* concept to unconstitutional invasions of privacy implicit in a motion to suppress will have been undermined and destroyed. Illegally obtained evidence is suppressed to discourage unlawful exercise of official authority—not to acquit guilty defendants. So long as unlawfully obtained evidence may be used in any respect, public officials are encouraged to continue violations to secure such evi-

dence. To hold otherwise would be to encourage unconstitutional searches and seizures of corporate property in the hope and expectation that information would be gained to convict a principal of the corporation.

Papers of corporations other than those having any relationship to International were freely used throughout the trial. They should have been suppressed and Hopps accorded a hearing upon the manner in which they perverted the investigative and prosecutive process, for which hearing he petitioned as an incident of his pretrial motion to suppress. *United States* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950); *United States* v. *Goldstein,* 120 F.2d 485 (2d Cir. 1941); *United States* v. *Paroutian,* 299 F.2d 486 (2d Cir. 1962).

3. The California Conservator's use and disposition of the documents seized from Hopps' office effectively constituted a denial of Hopps' rights under the Fourth and Fifth Amendments.

Even assuming the seizure of the papers from Hopps' office not to have violated his rights and that the California Insurance Commissioner (hereinafter Conservator) was legally in possession of them, it remained that the Conservator's authority as to the use and disposition of the papers was clearly limited under the terms of the statutory authorization (Sec. 1011, Calif. Code) and by the empowering conservatorship order itself. In essence, the order vested title to the assets of International in the Conservator but gave him only the right of possession as to its books, records and property. Further, the only operational authorizations contained in the order were ". . . to conduct as conservator the business of respondent insurer [International] . . ." and to pay proper claims and costs of operation.

Despite the limited nature of his powers and authorizations under the order, the Conservator allowed Federal Postal Inspectors and Internal Revenue agents, as well as representatives of the New York Attorney General, to examine and copy the papers seized while they were being held assertedly for the purposes of the conservatorship.

In March 1960, the conservatorship court ordered the papers returned to International. They were not returned, however, and in April, 1960, the Conservator caused the papers to be sent to the United States Attorney in Baltimore in response to a Federal subpoena *duces tecum* served on the Conservator.

At no time prior to the inspection of the papers by federal and state officers or their delivery to the U.S. Attorney in Baltimore did the Conservator seek or secure the consent or authority of the conservatorship court for such actions. In all material respects, such use and disposition of the papers resulted from the independent judgment of the Conservator who at all pertinent times had only a naked possessory interest in the papers and held them for the limited purposes of the conservatorship.

Hopps contended that such use and disposition of the papers by the Conservator violated his Fourth and Fifth Amendment rights and that the papers should therefore be suppressed for the purposes of his trial. Both the trial court and the Court of Appeals relied principally on *Dier* v. *Banton*, 262 U.S. 147 (1923) in refusing to suppress the papers. It is submitted that reliance on *Dier* in deciding the issue at hand is well-founded but that such reliance in fact leads to the inescapable conclusion that the actions of the Con-

servator were illegal and effectively constituted a denial of Hopps' rights—this for the reason that *Dier* unequivocally required the exercise of judicial discretion before the Conservator used or disposed of the papers in any manner not specifically contemplated by the terms of the conservatorship order.

In *Dier,* the receiver was enjoined from surrendering the bankrupt's papers to the District Attorney of New York City. Judge Hand, sitting in bankruptcy, subsequently vacated the injunction and his action was affirmed by the Supreme Court. However, it is readily apparent that in *Dier* there were at least two occasions wherein a judicial body, having jurisdiction over the operation of the bankruptcy proceeding, was afforded the opportunity to grant or withhold its consent to the proposed disposition of the papers. The necessity of the exercise of judicial discretion in such cases is clearly required by *Dier* where Mr. Justice Taft said:

> "Of course, where such books and papers are in the custody of the bankruptcy court, they cannot be taken therefrom by subpoena of a state court, except upon consent of the federal court. In granting or withholding that consent, the latter exercises a judicial discretion dependent on the circumstances, and having due regard to the comity which should be observed toward state courts exercising jurisdiction within the same territory. Ponze v. Fessendent, 258 U.S. 254, 259, 42 Sup Ct. 309, 66 L.Ed. 607, 22 A.L.R. 879. All we hold here is that, the court below having exercised discretion to allow the use of the books and papers in the custody of its officer upon subpoena by another court, the alleged bankrupt's right under the Fourth and Fifth Amendments have not been violated." (262 U.S. 151)

Elkins, supra, requires that the principle announced in *Dier* be applied in the case at bar. It was not. There was no opportunity for the conservatorship court to grant or withhold its consent, based upon the exercise of its judicial discretion, prior to the surrender of the papers to the U.S. Attorney.

Thus, the refusal of the courts below to suppress the papers so acquired by Federal prosecutors is in conflict with the decision of this Court in *Dier* v. *Banton* and constitutes a violation of Hopps' rights under the Fourth and Fifth Amendments.

Constitutional rights cannot be vitiated and abrogated by a civil conservatorship proceeding, absent a *judicial determination* taking such rights into account.

4. The acquisition of Hopps' papers from his New York office by means of a state subpoena served on and complied with by one neither in possession of nor authorized to produce the papers, in Hopps' absence and without his consent, was a flagrant violation of Hopps' Fourth Amendment rights and, further, such acquisition was clearly designed to avoid granting Hopps the immunity attending such production, in violation of his rights under the Fifth Amendment.

The acquisition of Hopps' papers from his New York office was fraught with illegality of such nature as to render such acquisition—and the subsequent use of the papers in the further investigation and trial of Hopps—a clear violation of Hopps' rights under the Fourth and Fifth Amendments. Again, Federal and state officers pursued their unrelenting investigation of Hopps under the guise of an administrative "inquiry", and an alleged voluntary delivery of Hopps' papers. The fact remains, as demonstrated below, that the New York proceedings were unquestionably directed at Hopps personally and resulted

in the illegal acquisition of documents which were subsequently utilized to convict him in a Federal criminal prosecution.

The New York "inquiry" was instituted *after* representatives of the New York Attorney General had examined and copied, with the consent and assistance of the California Conservator, but without approval of the conservatorship court, the papers seized from Hopps' San Francisco office. The entire New York proceeding was therefore "tainted" under the doctrine of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), wherein Mr. Justice Holmes condemned the use of "knowledge gained by the Government's own wrong."

Further, however, the circumstances attending the actual acquisition of the papers by New York officials require their suppression in a Federal criminal prosecution of Hopps in that the subpoena therefor was unreasonably broad and was served on one neither in legal possession of nor authorized to surrender Hopps' papers. In pertinent part, the subpoena called for ". . . *your correspondence files* . . . pertaining to International Guaranty and Insurance Co." (emphasis added), and was served on Loretto Lindhauer, a secretary in the office, who obviously possessed no such files. All of the files in the New York office belonged exclusively to Hopps and U.S. Marine. Hopps was not in New York at the time of the service of the subpoena nor did he authorize Lindhauer to surrender any of his papers in compliance with the subpoena.

Such a broad, indefinite subpoena, served on one not the owner of the papers in question, is of no efficacy for any purpose and the papers thereby acquired

by state authorities are inadmissible in a Federal criminal prosecution. *Elkins*, supra; *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (1946); *Wilson* v. *United States*, 221 U.S. 361 (1911); *Hale* v. *Henkel*, 201 U.S. 43 (1906).

Ultimately dispositive of whether the "New York" papers should have been suppressed for the purposes of a Federal criminal prosecution of Hopps is the fact that they were unquestionably impressed with an immunity prohibiting their use in any prosecution. The New York proceedings were assertedly launched under the provisions of Section 352, Article 23-A, of the New York General Business Law (App. 20a) which essentially empower the Attorney General to subpoena witnesses and require the production of documents which he deems pertinent to the inquiry. However, the legality and constitutionality of a Section 352 investigation is premised on the concomitant grant of immunity provided for under Section 359, Article 23-A (App. 24a). *Dunham* v. *Ottinger*, 243 N.Y. 423, 154 N.E. 298 (1926). This Court has held that where a statute compels incriminatory testimony, oral or documentary, an immunity as fully extensive as the hazards of prosecution imposed must be granted, and that only when such an immunity is afforded will a witness be compelled to "testify". *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Brown* v. *Walker*, 161 U.S. 591 (1896).

It is irrelevant that Hopps himself did not testify at the hearing or deliver the documents, nor does Section 359 require so literal a reading that the demand must be made, the records produced and the immunity conferred at the hearing itself. *People Ex Rel. Kenny*

v. *Adams*, 292 N.Y. 65, 54 N.E. 2d 10 (1944). The New York authorities thus could not compel the production by Hopps (much less by another) of his papers without conferring the immunity required by statute.

5. The acquisition, by means of a federal subpoena duces tecum, of documents from the Maryland office of International Guaranty and Insurance Underwriters, Inc., constituted a violation of Hopps' rights under the Fourth Amendment and the documents should therefore have been suppressed.

Hopps had standing to attack the illegal acquisition of documents from the Silver Spring, Maryland, offices of International, Maryland, in light of the trial court's finding that at all pertinent times he supervised and directed its business and that its office was staffed by members of the "Hopps Corps". In addition, Hopps had prepared many of the letters and memoranda maintained in the corporate files. *Jones* v. *United States*, supra. The Federal subpoena *duces tecum*, by means of which the documents were secured, called for, in pertinent part, the production of ". . . *all* documents, records, papers and correspondence in the possession of said Corporation at the time of the service of the subpoena." (emphasis added). A subpoena cannot be broader or more indefinite. This subpoena is therefore illegal per se and its implementation constitutes an unreasonable search and seizure. *Hale* v. *Henkel; Wilson* v. *United States; Oklahoma Press Publishing Company* v. *Walling*, supra. All matter obtained pursuant to this invalid subpoena should have been suppressed.

6. The failure of the trial court to segregate those documents suppressed from those not suppressed and to grant Hopps the required hearing as to the investigative use of those suppressed constitutes substantial error and effectively denies Hopps his rights under the Fourth Amendment.

Hopps consistently maintained that all of the documents in his San Francisco and New York offices were his personal papers, maintained in relation to his owned and controlled corporations and the corporations with and for which he did business. In connection with his motion to suppress all of the papers seized, under Rule 41(e) of the Federal Rules of Criminal Procedure, Hopps submitted a schedule and affidavit wherein he analyzed every one of thousands of documents seized from his offices and thereby demonstrated that the great bulk thereof was clearly his personal papers and that the remainder was the property of his wholly-owned and controlled corporations. Concurrently, Hopps moved for an evidentiary hearing to determine the extent to which any documents so suppressed (should all of them not have been suppressed and the case dismissed) may have been used by the Government in its investigation.[3] The motion was granted in regard to the California papers only as to the "purely personal papers of Hopps not related to International's business" and only as to the "personal papers of Hopps not 'pertaining to International Guaranty and Insurance Co.' " in regard to the New York papers.

The clear impact of the granting of the motion as to Hopps' personal papers was that the court had de-

[3] The subject schedule, demand for hearing and affidavit appear at page 32, 55 and 56, respectively, of the "Appendix For Appellant", submitted herewith.

termined that they had been obtained illegally and in violation of Hopps' Fourth Amendment rights. As the generic term "personal papers" provided Hopps with absolutely no meaningful criteria for pursuing his right to a hearing as to how the illegally obtained papers had been used by the Government—use which is clearly prohibited by *Silverthorne,* supra—he moved the trial court to segregate those papers suppressed from those not suppressed.

The court failed to identify and segregate the suppressed papers and held that it would rule only on specific papers presented to it for a pretrial ruling—this despite Hopps' contention that virtually every paper seized was his personal property and that each paper should be ruled on by the court (for which purpose the papers had been submitted to the court as a joint exhibit). While specifically preserving this contention, Hopps selected and submitted to the court some fifty-seven papers regarded as clearly personal and, as a result, eighteen of the papers were held to be personal and suppressed. This was the extent of the court's implementation of its holding that all of Hopps' personal papers should be suppressed. Such a proceeding most certainly cannot be equated to a meaningful segregation of the unspecified, suppressed documents and a hearing as to the use of such documents in the investigation. The trial court erred in this regard as did the Court of Appeals in affirming.

Hopps was thus effectively denied a means of identifying the suppressed papers and a determination of the extent to which they had been used by the Government in developing its case against him. Hopps' right to such a hearing, which he consistently asserted, is beyond question. *United States* v. *Coplon; United States* v. *Goldstein; United States* v. *Paroutian,* supra.

7. The trial court committed fundamental error in allowing the jury to find the necessary element of the offense charged (specific knowledge) from evidence adduced on an entirely unrelated matter and the Court of Appeals should have reversed on this ground.

By the terms of the trial court's charge, Hopps could be convicted only if the jury found that he had actual and specific *knowledge,* at the time of the mailings involved, that the claimed *assets* of certain corporations were absolutely valueless. During the trial, the Government had adduced evidence on a count of the indictment charging that the mailings had misrepresented the reinsurance facilities of International. As the Court of Appeals said, "The testimony about reinsurance was contradictory."

In its instructions, the trial court took from the jury, as a basis for conviction, the count regarding reinsurance facilities on the ground that the alleged misrepresentation as to such facilities was not contemplated within the scheme alleged in the indictment, i.e., misrepresentation of *assets.*

It was at this point that the trial court made the fundamental and substantial error of allowing the jury to consider the evidence adduced on reinsurance, a matter entirely unrelated to the scheme charged, to find the specific *knowledge* of Hopps that certain represented *assets* were absolutely valueless. Clearly critical to an appreciation of the magnitude of the error is the fact that Hopps would have been acquitted had the jury not found such knowledge on his part.

The Court of Appeals upheld the instruction on the exclusive ground that it afforded the jury a proper basis for finding the *willfulness* of Hopps in causing the brochure to be mailed—a question that had not

been raised on appeal. The distinction here is, of course, vital in that willfulness, as intent, may frequently be proved indirectly or from evidence essentially unrelated to the act charged. It is fundamental, however, that actual and specific *knowledge* of the valuelessness of assets, essential to conviction, must be proved by evidence related to the assets. Thus, the Court of Appeals embraced the error of the trial court and, by reason of its failure to consider the error urged, effectively denied Hopps due process of law and vitiated his Constitutional right to a fair trial.

The failure of the courts below to make the vital distinction between willfulness and specific knowledge constitutes plain and substantial error which can only be and should be corrected by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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